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Supreme Court, U.S.
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No. 03-1280

IN THE

Supreme Court of the United States

GEORGE E. WARREN CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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RULE 29.6 STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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The government's opposition repeats the Federal Circuit's error by erroneously contending that Congress' intent as expressed in the legislative history to 19 U.S.C. § 1313(j)(2) may be ignored because the "plain language" of the statute's "because of . . . importation" clause limits drawback to charges imposed *discriminatorily* on imports. But as George E. Warren Corporation's ("Warren") petition demonstrated, *Texport Oil Co. v. United States*, 185 F.3d 1291 (Fed. Cir. 1999), which first announced the discrimination requirement and upon which the Federal Circuit relied in this case, did *not* hold that the discrimination requirement is mandated by the "plain language" of the statute. Rather, *Texport* implicitly acknowledged that the "because of . . . importation" language is susceptible to more than one interpretation. *Texport*, however, failed to ascertain Congress' intent by consulting the pertinent legislative history, which, it is undisputed, contains no reference whatever to any discrimination requirement.

The government also persistently mischaracterizes Warren's position as asserting that any and every generalized tax that happens to be imposed on imported merchandise is eligible for drawback under § 1313(j)(2). Warren does not so contend. Rather, it is Warren's position — consistent with the legislative history that *Texport* failed to consult — that § 1313(j) authorizes drawback of those taxes and fees which are imposed on imported products *during the import process, i.e., while the goods are in Customs' custody*, as opposed to other charges that may be imposed on imported merchandise later in the stream of commerce. Warren's position thus is in accord with the longstanding purpose of drawback, which is to ensure, through a refund of duties, taxes and fees imposed during the import process, that U.S. exporters can compete on a level playing field with their foreign competitors.

I. The "Plain Language" of 19 U.S.C. § 1313(j)(2) Does Not Limit Drawback to Charges that Discriminate Against Imports.

The government contends that the "plain language" of 19 U.S.C. § 1313(j)(2) demonstrates that drawback applies only to taxes that discriminate against imports. Opp. 4-5. Even the *Texport* court did not subscribe to that view. Contrary to the government's assertion (Opp. 7), *Texport* did *not* "expressly rel[y] on the plain 'language' of Section 1313(j)(2)" when it discerned a discrimination requirement in § 1313(j)(2). *Id.* (quoting *Texport*, 185 F.3d at 1296). Indeed, *Texport's* sole express reference to the statutory "language" confirms the opposite conclusion. As the court stated, "this *language*, we think, is *best read* as . . . preclud[ing] the grant of drawback to a duty, tax, or fee that is assessed in a nondiscriminatory fashion. . . ." *Texport*, 185 F.3d at 1296 (emphasis added). The government's reliance on the principle that legislative history need not be consulted when a statute admits of one reading, and one reading only, is therefore misplaced.

Other aspects of *Texport* undermine the government's contention that the court relied upon the "plain meaning" of § 1313(j). Instead of stating, or even suggesting, that the language of § 1313(j)(2) "plainly" includes a discrimination requirement, the *Texport* court went to significant lengths to reconcile its interpretation of the statutory language with the overall purpose of the drawback statute. *See* 185 F.3d at 1296-97. The *Texport* court's analytical approach, therefore, in and of itself belies the notion that the court considered the meaning of "because of . . . importation" to be plain from its text. For it is axiomatic that "[w]here the language is plain and admits of no more than one meaning the duty of

interpretation does *not arise* and the rules which are to aid doubtful meanings *need no discussion*." *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (emphasis added). Given *Texport's* failure to consult the pertinent legislative history of a statute that requires interpretation, this Court should grant certiorari.

The government's argument that the Federal Circuit's decision does not conflict with a decision of any other court of appeals (Opp. 4) ignores the fact that the Federal Circuit possesses *exclusive* appellate jurisdiction over challenges to denials of drawback claims by the United States Bureau of Customs & Border Protection (formerly the United States Customs Service). Furthermore, the government incorrectly suggests that Warren seeks review by this Court to reconcile a conflict between Federal Circuit decisions. The decision below found "no flaw" in *Texport* (Pet. App. 10a) and relied on *Texport's* "express holding" (Pet. App. 7a) to deny Warren's claims for drawback of Harbor Maintenance Taxes ("HMT") and Environmental Taxes ("ET") under § 1313(j)(2). Review by this Court is, however, necessary to ensure that these two Federal Circuit decisions do not frustrate Congressional intent behind this statute, which is of great significance to U.S. exporters.[1]

1. The government is mistaken in its claim (Opp. 9) that Warren overstates the importance of drawback under 19 U.S.C. § 1313(j), which applies when the same or commercially interchangeable merchandise is exported or destroyed within three years of importation. In Fiscal Years 1999 through 2001, for example, 74% of all drawback paid was based on claims made under § 1313(j). By contrast, during this same period, 19 U.S.C. § 1313(a) and (b), which apply to articles manufactured in the United States with imported materials and which the government characterizes as the (Cont'd)

II. The Legislative History of § 1313(j) Confirms that Congress Intended the "Because of ... Importation" Clause Simply to Limit Drawback to those Charges that are Imposed on Imported Goods while they are in Customs' Custody.

The government asserts that "[n]othing in the legislative history of Section 1313(j) . . . states that the drawback applies to *every* tax or duty imposed on an imported good." Opp. 7 (emphasis in original). Warren does not disagree. What Warren does contend — and what the legislative history amply confirms— is that the "because of . . . importation" language limits drawback to those taxes and fees which are imposed on an imported good *while it is in Customs' custody* (such as the HMT and ET), as opposed to taxes and fees which are imposed on an imported good at a later point in the stream of commerce.

For example, the legislative history of § 1313(j)(1), which contains the identical "because of . . . importation" clause as subsection (j)(2), explains that subsection (j)(1) was enacted in order to provide "for drawback (refund) of duties, taxes, or fees paid on imported articles released from Government custody. . . ." *See* S. Rep. No. 96-999, at 23 (1980). The government's argument that this legislative history "merely purports to describe the pre-enactment state of the law" and "says nothing about the impact of the

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(Cont'd)

"more commonly-applied" provisions (Opp. 9), accounted for only 20% of drawback paid. Maryanne Carney, U.S. Customs and Border Protection, Office of Field Operations, Trade Compliance & Facilitation, Port of New York, Presentation, *National Drawback Program*, American Petroleum Industry Drawback Seminar, Charleston, SC, March 22-24, 2004.

enactment of the 'because of . . . importation' language" (Opp. 8) is directly refuted by the Senate Report, which leaves no doubt as to how Congress intended to remedy deficiencies presented by the "pre-enactment state of the law." As the Senate Report stated, "unless provision is expressly made" for drawback of duties, taxes, or fees paid on imported articles released from customs custody, "present law" would disallow drawback. *See* S. Rep. No. 96-999, at 23. Thus, Congress in one breath described both the pre-enactment state of the law and the intended remedy — § 1313(j)(1).

The government attempts (Opp. 8) to discount another statement from the legislative history which confirms that Congress intended to allow drawback of duties, taxes and fees paid "upon the importation" of goods (S. Rep. No. 98-308, at 29 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4910, 4938) by noting that this statement does not indicate that § 1313(j)(2) applies to "every tax." Warren does not suggest that it does. What Warren does contend is that this legislative history expressly confirms the drawback eligibility of taxes and fees on imported goods which are paid "upon the importation" of such goods, when the goods are in Customs' custody. The government disputes neither this clear statement in the legislative history nor the fact that the HMT and ET are so paid.

III. Warren's Interpretation of § 1313(j)(2) Fulfills Congressional Intent and does not Vitiate the "Because of . . . Importation" Clause.

The government maintains that under Warren's reading, the "because of . . . importation" clause "serves no function whatsoever" and is "deprive[d] . . . of meaning, contrary to the Court's directive 'to give effect, if possible, to every

clause and word of a statute.'" Opp. 6 (quoting *Duncan v. Walker*, 533 U.S. 167, 173 (2001)). No such result occurs because Warren does not argue that § 1313(j)(2) applies "to *any* fee assessed against an imported good" (Opp. 5-6) (emphasis in original), nor does it maintain that § 1313(j)(2) calls for "a complete refund of all taxes imposed upon imported goods, including generalized taxes that are imposed on imported goods and domestic products." Opp. 8-9. Rather, Warren's reading of § 1313(j)(2) recognizes that it is only those taxes which are imposed *during the import process*, while the goods are in Customs' custody, which are eligible for drawback. Warren's reading, therefore, does not negate the "because of . . . importation" clause so as to extend drawback to "any" tax "imposed" on "imported merchandise." Opp. 6. Far from reading the "because of . . . importation" clause out of the statute, Warren's reading gives it the meaning Congress intended.

As does Congress, Warren recognizes that nondiscriminatory federal taxes are not entitled to drawback if they are not imposed on imported goods while the goods are in Customs' custody. For example, 26 U.S.C. § 4064 imposes a "gas guzzler tax" on "the sale by the manufacturer of each automobile. . . ." The gas guzzler tax applies equally to imported and domestically-produced automobiles. But since it is imposed upon the *sale* rather than upon the *importation* of automobiles, it fails to satisfy the "because of . . . importation" requirement of § 1313(j)(2), properly construed.

The fallacy of the government's argument is demonstrated by the fact that the government cannot identify a single tax in existence at the time of § 1313(j)'s enactment which satisfied the Federal Circuit's discrimination

requirement. By contrast, under Warren's reading, § 1313(j) readily applied to existing taxes when enacted. For example, 26 U.S.C. § 5001 imposed a nondiscriminatory tax on distilled spirits "imported into the United States" and on domestically-manufactured spirits. The tax on imported spirits was (and is) imposed on imports at the time of entry, while the goods are in Customs' custody, thus satisfying Congress' criteria for drawback under § 1313(j)(2). By contrast, the best the government can do is cite to a decision more than 100 years old involving a discriminatory oleomargarine tax that was repealed *well before* § 1313(j) was enacted. *See* Opp. 9 (citing *In re Kollock*, 165 U.S. 526 (1897)); Tax Reform Act of 1976, Pub. L. No. 94-455 (repealing oleomargarine tax). Thus, under the government's reading, § 1313(j)(2) had *no application whatever* when enacted.

The government dismisses this anomaly as "irrelevant" because § 1313(j)(2) "was drafted to encompass future taxes, as well as then-enacted taxes and duties." Opp. 9. The legislative history, however, is devoid of any suggestion that Congress believed that it was merely addressing the possibility that it might someday enact a tax that discriminates against imports. Instead, Congress recognized that existing law precluded exporters from availing themselves of the drawback provisions for anything other than goods imported for manufacture, and it expressly stated that it was enacting § 1313(j) to "give U.S. firms more flexibility" in availing themselves of drawback so as to meet customer demands. *See* H.R. Rep. No. 96-1109, at 17 (1980). Congress would not have stated that it was giving U.S. firms "more flexibility" by enacting § 1313(j) if the lack of any existing discriminatory taxes on imports would have *precluded*

exporters from utilizing this provision. Yet that conclusion necessarily follows from the government's position and the Federal Circuit's decision.

IV. The Federal Circuit's Decision Significantly Undermines the Purpose of the Drawback Statute.

The government agrees that the longstanding purpose of the drawback laws is to ensure the ability of U.S. exporters to compete on an equal footing with foreign competitors by reducing cost disadvantages through a refund of sums paid to import materials. Relying on *Texport*, the government nevertheless argues that Congress did not suggest that refunding taxes paid to import goods which are also imposed on domestic production "was necessary to accomplish that goal." Opp. 9. *Texport*, of course, failed to search for such a proposition in the legislative history, and indeed, no support for such a proposition exists.

Equally telling is the fact that neither the government nor the Federal Circuit in this case or in *Texport* has explained *why* a refund of taxes paid to import goods, which are also imposed on domestic production, is not necessary to accomplish Congress' goal of leveling the international playing field. The government does not dispute that exporters such as Warren, who pay taxes upon the importation of goods which happen to be nondiscriminatory, do not require the same level playing field when they export goods from the United States. Nor can the government legitimately contend that the cost disadvantages cease to exist simply because the taxes paid by exporters such as Warren do not discriminate against imports. Because the position advocated by the government and upheld in this case and in *Texport* strikes at the heart of the purpose of the drawback laws, this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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